Supreme Court, U.S.
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No. 96-602

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

CHRISTI HAAS, as parent and natural guardian of SCOTT M. GLENN, II,
Petitioner,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

1. The government does not retreat from its previous admission that "the issues raised by this case are important,"[1] nor does it deny that these issues are recurring. The federal courts have been called upon repeatedly to adjudicate the constitutionality of conditioning an illegitimate child's eligibility for Social Security survivors' benefits on the requirement that the child sue to establish paternity before (or shortly after) birth. Pet. 21-22. As long as untimely deaths continue to claim expectant fathers before they have the chance to legitimate, acknowledge, or even learn about the unborn children they leave behind, children like Scotty Glenn will grow up not only without their fathers, but without the government support meant to replace that which their fathers would have otherwise provided. Denied a reasonable opportunity to establish their entitlement to that needed support, these children will remain, as Chief Judge Posner put it, locked in a box to which "[o]nly the Supreme Court possesses the key." Pet. App. 13a.

2. The government seeks to avoid review by arguing that this case is "controlled" by the plurality decision in *Lalli v. Lalli*, 439 U.S. 259 (1978), while simultaneously depicting petitioner as claiming that the case is "controlled" by *Mills v. Habluetzel*, 456 U.S. 91 (1982). Opp. 14. But as we previously explained, neither *Lalli* nor *Mills* squarely addresses the question presented here. The divided panel of the Seventh Circuit, and presumably the equally divided *en banc* court, reached sharply divergent positions on whether *Lalli* or *Mills* is more pertinent to this case. That is precisely why, as we put it in the petition, "[t]his Court's guidance is needed to clarify which of its two lines of authority is applicable in these circumstances." Pet. 10.

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[1] *See* Pet. 9 (quoting Affidavit of Frank A. Rosenfeld, Attorney, United States Department of Justice, supporting Commissioner's Motion for an Extension of Time to Respond to Petition for Rehearing *En Banc*, at 2).

Lalli, in contrast to this case, involved the inheritance rights of an adult illegitimate son who had ample opportunity to satisfy the statutory requirement by establishing paternity before his father died; it did not involve a child who was not even born until months after his father's death. Pet. 16. That difference alone is enough to raise a serious question as to whether *Lalli* even *applies*, much less *controls*. *See* Pet. 16. Indeed, as the panel majority noted, *Lalli* itself might well have been decided differently under the facts presented in this case. Pet. App. 8a. Moreover, a statute that requires an unwed pregnant teenager to file a paternity suit months before her suddenly deceased partner's baby is even born raises all of the concerns that troubled this Court in *Mills* — concerns that the *Lalli* plurality never had to consider.[2] As the Eleventh Circuit realized, "the *Lalli* reasoning does not lead to the *Lalli* result" where the facts are so different that the procedural inconvenience imposed on the adult son in *Lalli* becomes a total exclusion for children born shortly before or after their fathers' deaths. *Handley v. Schweiker*, 697 F.2d 999, 1004-05 (11th Cir. 1983). For all of these reasons, *Lalli* does not, as the government contends, conclusively establish the constitutionality of applying the Indiana intestacy statute to posthumous illegitimate children, much less the constitutionality of incorporating that statute into the Social Security Act.[3]

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[2] The government fails to mention, much less address, the concerns this Court expressed in *Mills*, *Pickett*, and *Clark* regarding the financial difficulties, emotional strain, social opprobrium, and confusion that "often attend the birth of an illegitimate child" — concerns that led the Court to conclude that it was unreasonable to require a mother to file a paternity suit within a short time (even several years) after the child's birth. *Mills*, 456 U.S. at 100; *Pickett v. Brown*, 462 U.S. 1, 12-13 (1983); *Clark v. Jeter*, 486 U.S. 456, 463 (1988).

[3] The government contends that the petition "acknowledge[d] that it would be necessary to overrule or limit *Lalli* in order for a challenge to the Indiana statute to succeed." Opp. 12 n.5 (citing Pet. 16-17 n.12). To the contrary, we maintained that this Court need not overrule *Lalli* to rule in our favor, although it "might appropriately use this case as a

Moreover, the plurality opinion in *Lalli* rested largely on "the State's interest in the orderly disposition of a decedent's property at death." *Lalli*, 439 U.S. at 268 & n.6 (noting that the state's interest in settling estates distinguished the statute in *Lalli* from the illegitimacy-based classifications that the Court had previously declared unconstitutional). But that state interest is conspicuously lacking in the Social Security Act: the federal government has no interest in the disposition of estates, which is a matter "particularly within the competence of the individual states." *Id.* at 265; *accord* Pet. App. 8a. Once again, the plurality's reasoning in *Lalli* simply does not apply to the facts presented here.

3. The government fails to identify a single federal interest sufficient to support the Act's incorporation of Indiana's five-month limitation on establishing paternity. Relying on *Lalli*, the government suggests that "the facts that the putative father is no longer alive, and that other parties . . . have no incentive to safeguard the fiscal interests of the Social Security program, pose dangers of collusion and fraud." Opp. 14.[4] This interest, however, does not support incorporation for at least three reasons.

First, a purported federal interest in preventing fraud bears no relationship to a requirement that paternity actions be brought within five months of the wage earner's death. The same alleged problems — the wage earner's inability to contest the claim and the asserted lack of other parties with incentive to do so — are present whether two months or two years have passed since the

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vehicle" for doing so. Pet. 16-17 n.12.

[4] There are serious doubts whether the "fraud and collusion" interest asserted by the government would have been sufficient, by itself, to uphold the statute challenged in *Lalli*. Justice Powell's plurality opinion in *Lalli* upheld the challenged statute based not only on the state's interest in preventing fraud and collusion, but also, as we noted above, on the state's interest in promptly and definitively winding up estates without the risk that straggling claimants would appear later. *Lalli*, 439 U.S. at 271.

wage earner's demise. *See Mills*, 456 U.S. at 101 (finding it unlikely that "the passage of 12 months will appreciably increase the likelihood of fraudulent claims"). Indeed, the same problems would exist if the wage earner were alive but comatose. *Cf. Handley*, 697 F.2d 999.

Second, as we explained in the petition, any federal interest in preventing fraud and collusion is seriously undermined by the Act's incorporation of other state intestacy statutes that do *not* impose any time limits on an illegitimate child's ability to establish paternity for inheritance purposes. *See* Pet. 15 n.10 (citing statutes). This undercuts the government's apparent claim that its different treatment of illegitimate children is "substantially related to an important governmental objective." *Clark*, 486 U.S. 456, 461 (1988); *see id.* at 464 (state's asserted interest in avoiding fraud was undermined by its use of longer limitations periods to establish paternity in other contexts); *Mills*, 456 U.S. at 104-05 (O'Connor, J., concurring) (same).[5] If the Social Security Act's goals are adequately served by its incorporation of state intestacy statutes that impose no time limit whatever on an illegitimate child's ability to establish paternity, it is difficult to see how the incorporation of Indiana's five-month limitation period is substantially related to the same interests or carefully tuned to alternative methods of furthering those interests.[6]

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[5] For the same reasons, the Court should not give significant weight to the government's footnote (Opp. 14 n.7) suggesting that the incorporation of Indiana's five-month limitation could be supported by a federal interest in the timely resolution of benefit claims. This assertion is similarly undermined by the fact that many states' inheritance statutes impose no time limit at all on a child's ability to establish paternity. *See* Pet. 15 n.10 (citing intestacy statutes).

[6] The widespread availability of "increasingly sophisticated" genetic paternity tests, *cf. Clark*, 486 U.S. at 465, further confirms that the statute could be tailored more narrowly to the asserted federal interest in avoiding fraud and collusion. For instance, Social Security benefit claims could be (and are, in some cases) determined by genetic testing of the putative father's grandparents. *See, e.g., Krenz-Buchanan v.*

Third, there is no merit to the government's suggestion (Opp. 14) that the Act's incorporation of Indiana's five-month limitation period can be justified because "other parties with ready access to probative evidence [of paternity] ordinarily have no incentive" to challenge the child's claim. To the contrary, there will often be other parties interested in challenging such claims. For one, as the government itself points out (Opp. 14 n.7), other dependent children of the wage earner might be at risk of having their survivors' benefits reduced by the claim of an additional, illegitimate child. For another, when the wage earner leaves behind an estate above and beyond his survivors' benefits, those who would otherwise inherit from the estate have an interest in challenging claims that would reduce their distributive share. And other concerns could also provide an incentive to challenge paternity claims. The wage-earner's parents, for example, might not wish to be legally recognized as the child's grandparents. There is thus no indication that other parties lack incentive to challenge posthumous paternity claims, and certainly no showing that such an alleged lack justifies a five-month limitation period on establishing paternity.

4. The government suggests that *Mathews v. Lucas,* 427 U.S. 495 (1976), foreclosed all further constitutional challenges to the Social Security Act's incorporation of state intestacy laws for determining benefit eligibility. Opp. 12-13. The only issue before the Court in *Mathews,* however, was the constitutionality of requiring proof of dependency for some children while providing presumptions of dependency for others. 427 U.S. at 497-98. The *Mathews* Court considered the intestacy law provision of the Act only to determine whether eligibility for

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Shalala, 884 F. Supp. 324, 325 (W.D. Wisc. 1995); *Outwater v. Secretary of Health and Human Services,* 894 F. Supp. 1114, 1118 (E.D. Mich. 1995). And as Judge Wald noted in a recent D.C. Circuit case, "Congress itself has acknowledged that the accuracy of genetic testing has 'eliminate[d] the rationale' for time limits on the establishment of paternity." *Miller v. Christopher*, 96 F.3d 1467, 1475 (D.C. Cir. 1996) (Wald, J., concurring).

intestate inheritance was a reasonable proxy for dependency. *Id.* at 514-15. There was thus no occasion for the Court to consider whether conditioning benefit eligibility on state laws that impose too-short periods for establishing paternity is itself a violation of equal protection. Judge Wood was therefore correct: this issue was "not before the Court" in *Mathews*. Pet. App. 17a; *see also* Pet. 7.

Even if the government were correct that *Mathews* speaks to this issue, certiorari should still be granted. As Judge Wood pointed out in her dissent, the Court in *Mathews* "did not indicate with precision what lesser level of scrutiny was actually being used." Pet. App. 17a. *Mathews* itself only says that it applied "less than strictest scrutiny." 427 U.S. at 510. Although some cases (*e.g.*, *Clark*, 486 U.S. at 461) cite *Mathews* as applying intermediate scrutiny, it is clear that *Mathews* actually applied a form of rationality review. *E.g.*, *Mathews*, 427 U.S. at 509 ("the statutory classifications . . . are *reasonably related* to the likelihood of dependency at death") (emphasis added). The *Mathews* Court justified the Act's disparate treatment of illegitimate children on the ground of "administrative convenience" (*id.*), but this Court has consistently held that "administrative convenience" cannot support a classification subject to intermediate scrutiny.[7] This Court's later cases (*Mills*, *Pickett*, and *Clark*) establish quite clearly that intermediate scrutiny, not rational basis, is the standard that governs claims of discrimination against illegitimate children. These holdings cannot be squared with *Mathews* and its "administrative convenience" rationale.[8]

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[7] *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 198 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

[8] The government's other principal case, *Lalli*, suffers from a similar problem. The plurality in *Lalli* required only that the statute's relation to the state's asserted interests not be so "tenuous that it lacks the *rationality* contemplated by the 14th Amendment." 439 U.S. at 273

5. Finally, the government fails to address the conflict between the decision below and the Eleventh Circuit's decisions in *Daniels v. Sullivan*, 979 F.2d 1516 (11th Cir. 1992), and *Handley v. Schweiker*, 697 F.2d 999, except to concede that "*Daniels* and *Handley* indicate that this case might be resolved differently by the Eleventh Circuit." Opp. 15.

The government instead suggests that the Seventh Circuit's affirmance by an equally divided *en banc* court has no precedential value and therefore creates no conflict warranting certiorari. However, as we showed in the petition (at 21 n.15), the Seventh Circuit's equally divided *en banc* affirmance creates no impediment to certiorari. While the government rejoins that this Court has granted review to judgments rendered by equally divided courts of appeals only "in the most exceptional circumstances" (Opp. 16 n.8), that is clearly not the case. This Court has granted certiorari on numerous occasions to review judgments of equally divided *en banc* courts of appeals. *See, e.g., Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988); *Hill v. Lockhart*, 474 U.S. 52 (1985); *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam); *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102 (1981); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *see also Frisby v. Schultz*, 487 U.S. 474, 478-79 (1988). Similarly, equally divided *en banc* judgments have proven no obstacle to this Court in noting probable appellate jurisdiction. *See, e.g., Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279 (1985); *Frisby*, 487 U.S. at 478-79. This is hardly the "paucity" of cases the government describes. Opp. 16 n.8. Indeed, given that *en banc* review is an extraordinary procedure in and of itself, *see* Fed. R. App. P. 35(a) (*en banc* review "ordinarily will not be ordered"), and that an even division among *en banc* judges is

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(emphasis added). As with *Mathews*, this "rationality" standard cannot be squared with *Mills*, *Pickett*, and *Clark*, which require that a classification on grounds of illegitimacy be "substantially related to an important governmental objective." *E.g., Clark*, 486 U.S. at 461.

rarer still, this Court has granted review in a significant number of such cases.

If anything, the fact that the judges of the Seventh Circuit divided six-to-six indicates the need for this Court's review. As then-Justice Rehnquist wrote in a case presenting a similar situation,

> The sharp split amongst the judges who considered this case below demonstrates that our past precedents do not conclusively address the issues central to this dispute. In the same manner that we expect considered and deliberate treatment of cases by these courts, we have a concomitant responsibility to aid them where confusion or uncertainty in the law prevails. . . .
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> * * *
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> The mathematically even division of the Court of Appeals on the petition for rehearing *en banc* gives some indication of the divergence of judicial views which may be expected of conscientious judges on difficult constitutional questions such as this. Our views may be no less divergent, and no less persuasive to one another, than were the views of the eight judges of the Court of Appeals. But believing as I do that we cannot under our Rules properly leave this important question of law in its present state, I would grant the petition for certiorari.

Ratchford v. Gay Lib, 434 U.S. 1080, 1082, 1085-86 (1978) (Rehnquist, J., joined by Burger, C.J., and Blackmun, J., dissenting). The same holds true here: This Court's "past precedents do not conclusively address the issues central to this dispute," and "[t]he mathematically even division of the Court of Appeals" indicates both the importance of the issue presented and the need for this Court's review.

Certiorari should be granted.

Respectfully submitted,

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